IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

FREDERICK M. ROWE,
JOSEPH DUCOMUN,

of

KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
920 World Center Building,
Washington 6, D. C.

HAROLD GREENBERG,
FINE HANDIN,
11 South LaSalle Street,
Chicago 3, Illinois

Attorneys for Respondent.

INDEX

CITATIONS

Cases:

Page

Statutes:

Clayton Act, as amended:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 864

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS

The prior opinions of the Federal Trade Commission, the Court of Appeals and this Court are reported, respectively, at 54 F.T.C. 673; 261 F. 2d 725; and 363 U.S. 166. The judgment of the Court of Appeals on remand modifying and affirming the Federal Trade Commission's order to cease and desist (Pet. 12) is unofficially reported at 1960 CCH Trade Cases par. 69,839.

QUESTION PRESENTED

Section 11 of the Clayton Act, as amended, 15 U.S.C. § 21 (1958), provides that any party subject to an order to cease and desist may petition for review by a Court

of Appeals, which thereupon shall have "jurisdiction to affirm, set aside, or modify the order of the Commission * * *."[1] In the instant case, the Court of Appeals modified an omnibus order which sweepingly enjoined respondent from all violations of Section 2(c) of the Robinson-Patman Act, far beyond the compass of the controversy at bar which concerned solely the respondent broker's participation in one unusual transaction between a specific seller and a specific buyer.[2]

Properly stated, the question presented is whether the Court of Appeals abused its statutory reviewing powers by modifying an administrative order exceeding the exigencies of the case, where from the outset respondent contested the legal premises underlying the order.

STATEMENT

From the beginning, this proceeding concerned a competitive contest between respondent and a rival food broker for a large sale of apple concentrate to one customer in 1954. To meet competition and the buyer's terms for his unusually large order, respondent accepted a reduced rate of brokerage commission from

---

[1] The FTC's petition (Pet. 2-3) mistakenly invokes and excerpts Section 11 as amended in 1959, although Section 2 of the Act of July 23, 1959 explicitly renders the amendments inapplicable to review proceedings commenced before that date. Cf. *Sperry Rand Corp.* v. *Federal Trade Commission*, 1961 CCH Trade Cases par. 69,920 (D.C. Cir. Feb. 9, 1961).

[2] The FTC's petition incorrectly describes its order as "particularized" (Pet. 9), ignoring its second paragraph which universally proscribes brokerage payments or allowances "in any other manner, * * * directly or indirectly, to The J. M. Smucker Company, or to any other buyer." See the text of the order, note 3 *infra*.

his seller principal, at the same time as the seller lowered its price to this particular buyer.

The Federal Trade Commission's complaint challenged this single transaction as an illicit allowance of brokerage to the buyer on the part of respondent broker (R. 2), under a novel interpretation of Section 2(c) of the Robinson-Patman Act. 15 U.S.C. § 13(c). At the conclusion of the administrative hearing which concerned only the particular transaction for this seller with this buyer, the FTC issued an order broadly directing respondent to cease and desist from violating Section 2(c) "in any other manner," "directly or indirectly," in dealing on behalf of "any" seller with "any buyer."[3]

---

[3] The order prohibits respondent "in connection with the sale of food or food products for Canada Foods Ltd., or any other seller principal," from

"(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; *or*

"(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account." (No. 61, O.T. 1959, R. 202, 204-205) (All record references hereafter denote the record in No. 61.)

Before the FTC, respondent had contended that Section 2(c) did not apply to him as an independent seller's broker, that no illicit brokerage payment arose from his acceptance of a smaller commission, and that this was a "wholly isolated transaction of *de minimis* dimensions." (Resp. Br. p. 23) Respondent also urged that the FTC's doctrine would not only hamstring his business, but would clash with national antitrust policy by stabilizing brokerage commissions in the distribution of food products—particularly since "Section 11 of the Clayton Act expressly declares that no Commission order 'shall in any wise relieve or absolve any person from any liability under the antitrust Acts.'" (Br. p. 26)

Upon review, the Court of Appeals set aside the FTC's order. The court held Section 2(c) inapplicable to independent sellers' brokers such as respondent, and ruled that no illicit brokerage payment resulted from a seller's price reduction when coupled with a reduction in brokerage commission. 261 F.2d 725. Also, noting that the FTC "did not proceed against the buyer or the seller," the court expressed doubt as to the public interest of proceeding against a "private grievance between rival brokers," and observed that

> "The effect of respondent's order is that the commissions of a seller's broker are rendered immune from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal." *Id.* at 728.

By a 5:4 decision on June 6, 1960, this Court reversed and remanded "for further proceedings consistent with the opinion." 363 U.S. 166. In the face of a dissenting opinion by four Justices expressing concern that "all

legitimate commission rates are frozen in destruction of competition, and in actual violation of the anti-trust laws," 363 U.S. at 180, the majority opinion stressed the narrow focus of its holding:

> "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case." 363 U.S. at 175-176.

Indeed, the majority disclaimed "an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the 'savings' in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment." *Id.* at 177 n. 19.

Following the remand, respondent filed a motion requesting the Court of Appeals, *inter alia*, to set aside or modify the FTC order for legal reasons not adjudicated in that court's original decision. The motion emphasized the incompatibility with this Court's opinion created by the broadside prohibition of the FTC's order on transactions by respondent on behalf of *all* sellers with *all* buyers in *any manner* (pp. 6-9). In addition, respondent cited this Court's supervening decision in *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479 (1960), which modified an order under the National Labor Relations Act, whose enforcement provisions were patterned after the Clayton Act, in the absence of any "generalized scheme" of illicit activity to support an

omnibus injunction reaching also conduct toward "any other employer." *Id.* at 481.

Disputing the court's *power to entertain* respondent's contentions, the FTC requested a judicial decree affirming the Commission's broad order to cease and desist, without explaining or justifying its factual basis in the record.[4] The Court of Appeals denied respondent's motion, but *sua sponte* modified the FTC order by deleting its references to "any other" sellers or buyers, and thereupon entered an order of affirmance.

ARGUMENT

As will be detailed, the modification of the FTC order by the Court of Appeals comports with traditional principles governing the statutory review of Federal Trade Commission orders, and does no more than conform the scope of the order with the compass of the administrative proceeding—in the absence of *any* showing to justify an omnibus injunction. That modification in no way usurps the FTC's *initial* responsibility for fashioning orders to cease and desist, but rather implements a reviewing court's obligation to supervise FTC orders which ultimately can become *judicial decrees* enforceable by contempt proceedings. Nor did the court err in revising an order which had been contested at every stage by respondent, whose post-remand motion amplified its earlier challenges in the proceeding on the merits. Judicial housekeeping of this nature by a Court of Appeals, based on the facts of a particular case, presents no overriding issue of public importance—particularly since the ruling be-

[4] Respondent's Answer in Opposition, Oct. 25, 1960, p. 9; Respondent's Memorandum in Opposition, Nov. 2, 1960, p. 5.

low has in *no reported instance* been followed by the modification of *any other* FTC order.

1. In Conforming the FTC Order With the Scope of the Administrative Proceeding, the Court of Appeals Did Not Exceed or Abuse Its Powers of Review

The Court of Appeals here properly declined to affirm an omnibus injunction, unsupported by *any* factual basis, in accord with this Court's unanimous holding in the *Communications Workers* case.

The narrow compass of the facts behind the adjudication at bar was traced by the majority opinion in this Court's decision on the merits. 363 U.S. 166, 173-176. Apart from stressing the "circumstances of each case" and disclaiming any "absolute rule" where "brokerage [was] passed on to a single buyer," *id.* at 176, 177 n. 19, the majority opinion repeatedly emphasized the element of discrimination in the application of Section 2(c). Throughout, the Court's opinion discussed the individual buyer's particular "services" or "method of dealing," as factors in the ascertainment of "a discriminatory price by means of a reduced brokerage charge." *Id.* at 173, 176, 177 n. 19.

The Commission's omnibus cease and desist order obliterated these elements entirely.[5] If any future reduction in respondent's brokerage commission by the seller were "passed on" as a *uniform* price "allowance" or "discount" to *all* customers, respondent could nonetheless violate paragraph 2—a result which this Court's opinion characterized as "absurd." *Id.* at 176.[6] Furthermore, both paragraphs of the order pur-

[5] See note 3, *supra*, for text of the order.

[6] Thus, the Commission recently found a Section 2(c) violation by a price reduction *in the absence of* discrimination between competitors. *Venus Foods, Inc.*, Dkt. 7212, p. 8 (Oct. 28, 1960).

port to impose liability *regardless* of buyer services or methods of the type which the Court excepted as creating "quite a different case." *Id.* at 173.

Finally, the impact of the order was magnified by its omnibus ban on transactions by respondent on behalf of *all* sellers with *all* customers which in *any manner*, directly or indirectly, transgress the vague proscriptions of Section 2(e).

In these circumstances, the Court of Appeals properly conformed the order with the contours of the case. As this Court's recent *Communications Workers* decision held, a respondent in a Labor Board proceeding could not be indiscriminately ordered to cease and desist from violating the Act as to a named employer "or any other employer," in the absence of a "generalized scheme" of illicit activity to support an omnibus prohibition. 362 U.S. 479, 481 (1960). There as here, the administrative order was judicially modified by deleting the catch-all words ensnaring transactions with "any other" person.

In this case, the Court of Appeals did not exceed its limited supervisory role over administrative orders to cease and desist. Only weeks after modifying the instant order, the court declined to revise another agency order in a price discrimination case, acknowledging that "the nature of sanctions imposed must be left largely to the regulatory agency, and unless there are serious reasons for a limitation in the scope of the order, the courts will not interfere with the determination of the agency in that respect." *Wilson & Co.* v. *Benson*, 286 F. 2d 891, 896 (7th Cir. 1961).

But *this* case *did* disclose "serious reasons for a limitation in the scope of the order." The complaint

charged and the Commission ultimately proved one unusual transaction, which arose in a unique competitive situation involving one particular seller and one particular buyer. Nothing in the case remotely suggested a "generalized scheme" or pattern of violation to justify an omnibus order. Actually, until this Court's 5:4 decision in 1960 invalidated this transaction on the merits, it appeared perfectly proper within the legal labyrinth of the Robinson-Patman Act.[7]

Manifestly, the court below has not authorized any wholesale and indiscriminate rewriting of administrative orders to cease and desist, or misconceived the *Communications Workers* decision as establishing such a "rule of law." (Pet. 10)

The ruling of the Court of Appeals does symptomize a recurrent concern over the infinite scope of the typical omnibus FTC order. By "confounding rather than clarifying the respondent's legal duties, it inherently frustrates reasonable attempts in good faith to comply."[8] Moreover, such indefinite orders must inevitably "shift to the courts a responsibility in enforcement proceedings of trying issues * * * which Congress has primarily entrusted to the Commission." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54 (1948).

Above all, boilerplate orders mock that "special

[7] Indeed, as FTC Commissioner Kern recently revealed, "The file was studied by the Antitrust Division, which concluded that the Court of Appeals was correct and the Commission was wrong, and it recommended that the Solicitor General not seek review by the Supreme Court." Remarks of William C. Kern, Commissioner, Federal Trade Commission, before the Mechanical Contractors Associations of Texas, Inc., p. 9, Jan. 14, 1961.

[8] Report of the Attorney General's National Committee to Study the Antitrust Laws 168 (1955).

competence" which Congress expected the Commission to exercise when "formulating remedies to deal with problems in the general sphere of competitive practices." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

2. Respondent Consistently Challenged the Premises Underlying the Omnibus Order to Cease and Desist

The Commission's cavil at the Court of Appeals' *power* to modify the order, in light of respondent's alleged waiver of its rights, is refuted by respondent's persistent challenges of the legal premises behind the FTC order at every stage of this controversy.

In the first place, the basis for the Commission's order was contested throughout the administrative proceeding, and put in issue before the Court of Appeals since 1958. Respondent from the outset (1) denied the Commission's charges at the administrative level (R. 6); (2) submitted a proposed order of dismissal to the Hearing Examiner (R. 173); (3) excepted before the Commission to the Examiner's adverse rulings (R. 203); (4) declined compliance with the Commission's order pending judicial review (R. 203, 211-212); and (5) filed a statutory petition praying that the order be set aside as defective, apart from the proceeding's substantive failings, because it was "vague, exceeds the statutory limits of Section 2(*c*), and as applied would conflict with the Sherman Act." (R. 214) The Court of Appeals set aside the Commission's order on several interrelated grounds (R. 224-225),[9] but was

[9] Before the Court of Appeals, the briefs treated the impact of the FTC's order on competition in food distribution, as well as the Commission's preoccupation with a picayune and isolated transaction affecting only the particular parties involved. (See Pet. Br. pp. 27-33, Reply Br. pp. 7, 14-16) Respondent expressly con-

in turn reversed by this Court's divided decision which remanded the proceeding for further appropriate action that culminated in the modification at issue today.

To be sure, respondent's post-remand motion in 1960 amplified the original challenge to the order once the merits had been determined by this Court.[10] The motion also advanced supervening legal developments since that court's original consideration of this case in 1958—principally this Court's *Communications Workers* decision in 1960 which directed modification of an omnibus Labor Board order, in the absence of a "generalized scheme" of dereliction. Respondent also pointed to the Commission's reinforced authority in 1959 to impose heavy fines for violation of final cease and desist orders, coupled with the admonition by Congress "to issue orders which are as definitive as possible."[11]

The Commission's claim that respondent nevertheless waived its rights to attack the scope of the order (Pet.

---

tended, and the FTC disputed, that the sweeping terms of the original cease and desist order improperly barred normal competitive price reductions to *all* customers. (Reply Br. pp. 1, 7, 15; FTC Br. pp. 39-42) At no time did the FTC question the court's powers to consider these contentions in 1958.

[10] Whatever its relevance to this case, the doctrine which counsels appellate courts against entertaining particular arguments not specifically urged at the administrative level is flexible enough to accommodate countervailing considerations, including supervening legal developments presented at the earliest opportunity. *Hormel* v. *Helvering*, 312 U.S. 552, 556-558 (1941); cf. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). And while the Court of Appeals formally modified the order on its "own motion," respondent may, of course, urge *any* argument in support of the judgment of modification. *E.g.*, *Langnes* v. *Green*, 282 U.S. 531, 539 (1931).

[11] S. Rep. No. 83, 86th Cong., 1st Sess. 3 (1959).

5-8) ignores the realities of this case—as epitomized by the petition's citation of *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 654, O.T. 1960, as raising a "related question." (Pet. 2 n. 1) In that case, "No hearing was held, but a stipulation was filed in which both respondents admitted the charges and agreed to the entry of a broad order," and further "agreed that the appropriate Court of Appeals could enter decrees pursuant to the stipulation without notice, hearing or objection." 283 F. 2d 26, 28 (1st Cir. 1960). By contrast, *this* respondent at each stage fought the Commission's order, and challenged its premises at every turn.

The contention of waiver is even more startling since the courts have often revised unjustifiably sweeping FTC orders—*even in the absence of a specific prior challenge to the order's verbiage at the administrative level.*[12]

CONCLUSION

The instant modification of the Commission's omnibus order was obviously correct on its peculiar facts, and generates no public controversy deserving of Supreme Court review. As this Court recently observed, "One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator

---

[12] *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 611 (9th Cir. 1952); *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 192 F. 2d 535 (7th Cir. 1951); *Folds* v. *Federal Trade Commission*, 187 F. 2d 658 (7th Cir. 1951); *Parker Pen Co.* v. *Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946); *Milk and Ice Cream Can Inst.* v. *Federal Trade Commission*, 152 F. 2d 478 (7th Cir. 1946); *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580 (2d Cir. 1944); *Etablissements Rigaud, Inc.* v. *Federal Trade Commission*, 125 F. 2d 590 (2d Cir. 1942); *Standard Container Mfgrs.' Ass'n* v. *Federal Trade Commission*, 119 F. 2d 262 (5th Cir. 1941).

should be fenced in." *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959).

The FTC's professed "fears that the judgment entered in this case will have a serious and detrimental impact" on other proceedings (Pet. 11) is, in the end, a forensic spook. In the first place, the petition inaccurately asserts that FTC Clayton Act orders have "consistently" reached beyond the "particular parties involved" in the challenged transactions, since numerous Robinson-Patman orders by the Commission expressly bar discriminatory payments *only* to the specified recipients implicated in the record of administrative proceedings.[13] Furthermore, since the instant order was modified in November 1960, over a dozen omnibus cease and desist orders have issued under the Robinson-Patman Act,[14] unembarrassed by the ruling now ten-

---

[13] *E.g.*, *Charles V. Herron*, 30 F.T.C. 445, 451 (1940); *Mississippi Sales Co.*, 30 F.T.C. 1282, 1297 (1940); *Reeves Parvin & Co.*, 28 F.T.C. 1429, 1444 (1939); *Quality Bakers of America*, 28 F.T.C. 1507, 1525 (1939); *American Oil Co.*, 29 F.T.C. 857, 866 (1939); *C. R. Anthony Co.*, 29 F.T.C. 922, 929 (1939), 30 F.T.C. 1103 (1940); *Fruit & Produce Exchange*, 30 F.T.C. 224, 233 (1939); *Golf Ball Mfgrs.' Ass'n*, 26 F.T.C. 824, 850 (1938); *Webb Crawford Co.*, 27 F.T.C. 1099, 1116 (1938); *Oliver Brothers, Inc.*, 26 F.T.C. 200, 214 (1937).

[14] Section 2(c) orders: *Bruce A. Graves*, Dkt. 8063 (April 13, 1961); *Thomasville Chair Co.*, Dkt. 7273 (March 15, 1961); *J. Segari & Co.*, Dkt. 8065 (Jan. 6, 1961); *A. R. Fiorita Fruit Co.*, Dkt. 8067 (Dec. 1, 1960); *National Fiorita Fruit Co.*, Dkt. 8055 (Nov. 23, 1960); Section 2(a) orders: *Faber Brothers, Inc.*, Dkt. 8062 (March 16, 1961); *Perfect Equipment Corp.*, Dkt. 7707 (Jan. 12, 1961); Section 2(d) orders: *Penick & Ford Ltd.*, Dkt. 8118 (April 12, 1961); *S. C. Johnson & Son, Inc.*, Dkt. 8177 (March 16, 1961); *Vanity Fair Paper Mills, Inc.*, Dkt. 7720 (March 15, 1961); *Simmons Co.*, Dkt. 8116 (March 3, 1961); *Chun King Sales, Inc.*, Dkt. 8093 (Jan. 12, 1961); *Shulton, Inc.*, Dkt. 7721 (Jan. 5, 1961); *Dennis Chicken Products Co.*, Dkt. 8091 (Dec. 21, 1960); *Ball Brothers Co.*, Dkt. 8092 (Dec. 21, 1960); *Kerr Glass Mfg. Corp.*, Dkt. 8096 (Dec. 7, 1960).

dered for review, while not one order has been limited on its account.

Nor *can* dire consequences result. For the Commission's Clayton Act proceedings typically concern a "generalized scheme" of discrimination, where broader injunction may well be appropriate to prevent future transgressions.[15]

If this Court nevertheless deems the decision below to warrant review, respondent respectfully suggests that it be set for argument immediately following No. 654, where the Court will review judicial controls of Labor Board orders.

Respectfully submitted,

FREDERICK M. ROWE,
JOSEPH DUCOEUR,

of

KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
800 World Center Building,
Washington 6, D. C.

HAROLD ORLINSKY,
FRED HERZOG,
11 South LaSalle Street,
Chicago 3, Illinois

Attorneys for Respondent.

May 2, 1961

---

[15] *E.g., Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).